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22 YUHAAVIATAM OF SAN MANUEL NATION,
23 a federally recognized Indian tribe, also federally
24 recognized as SAN MANUEL BAND OF MISSION INDIANS

15
16 **UNITED STATES DISTRICT COURT**
17 **FOR THE CENTRAL DISTRICT OF CALIFORNIA**
18 **EASTERN DIVISION – RIVERSIDE**

19 BLUETRITON BRANDS, INC.,
20 Plaintiff,
21 v.
22 UNITED STATES FOREST SERVICE,
23 RANDY MOORE, in his official
24 capacity as Chief of the U.S. Forest
25 Service,
26 CHRISTOPHER FRENCH, in his
27 official capacity as Deputy Chief for the
28 National Forest System of the U.S. Forest
Service,

Case No.: 2:24-cv-09720-JGB-DTB

**MEMORANDUM OF LAW IN
SUPPORT OF PLAINTIFF-
INTERVENOR'S MOTION FOR
PRELIMINARY INJUNCTION**

Hearing Date: February 3, 2025
Hearing Time: 9:00 AM
Courtroom: 1
Judge: Hon. Jesus G. Bernal

Action Filed: August 6, 2024

1 JENNIFER EBERLEIN, in her official
2 capacity as Regional Forester for the
3 Pacific Southwest Region of the
4 U.S. Forest Service,

5 DANELLE HARRISON, in her official
6 capacity as Forest Supervisor of the San
7 Bernardino National Forest of the
8 U.S. Forest Service,

9 MICHAEL NOBLES, in his official
10 capacity as Front Country District Ranger
11 of the U.S. Forest Service,

12 Defendants.

13 YUHAAVIATAM OF SAN MANUEL
14 NATION, a federally recognized Indian
15 tribe, also federally recognized as SAN
16 MANUEL BAND OF MISSION
17 INDIANS,

18 [PROPOSED] Plaintiff-Intervenor.

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I. INTRODUCTION

Yuhaaviatam of San Manuel Nation, a federally recognized Indian tribe, also federally recognized as the San Manuel Band of Mission Indians (“Nation”), brings this motion to preliminarily enjoin official agency action that purports to disrupt the status quo that has been in place for nearly a century and that will completely cut off the delivery of water to the Nation’s Arrowhead Springs property (Arrowhead Springs), in direct violation of numerous federal laws, regulations, and policies, as well as the trust responsibility that the United States Forest Service (USFS) and its employees (collectively, “Defendants”) owe the Nation.

II. BACKGROUND

A. Sacred and Historic Arrowhead Springs

Arrowhead Springs totals approximately 2,000 acres, is located within the Nation’s ancestral territory, and constitutes one of the Serrano people’s most culturally significant landscapes. *See Declaration of Alexandra McCleary in Support of Motion to Intervene and Motion for Preliminary Injunction (McCleary Decl.) at ¶¶ 5, 8, 10.* Arrowhead Springs features prominently in the Nation’s oral history, was once the site of an ancient village known as Apuiva’t occupied by the Nation’s ancestors, and includes a large arrowhead-shaped natural landmark, natural hot mineral springs, and other culturally valuable resources. *Id.* at ¶ 8. The property also includes a historic hotel constructed in 1939, which served as a naval hospital during World War II and a Hollywood filming and vacation destination thereafter. *Id.* at ¶ 9. The Tribe reacquired Arrowhead Springs in 2016 in an ongoing effort to reclaim and steward its ancestral lands. *Id.* at ¶ 7. In addition to the property’s historical significance and cultural resources, Arrowhead Springs contains administrative offices, an events center, recreational facilities, irrigated land used for defensible space, cultural sites, and fire protection facilities upon which the Nation and surrounding local governments depend to combat wildfire. *See Ex. 13, Letter from Nation to USFS (Nov. 15, 2024); see also Declaration of Rodney Garton in*

1 Support of Motion to Intervene and Motion for Preliminary Injunction (Garton
2 Decl.) at ¶¶ 6, 8, 9, 10; *see also* Ex. 12, Letter from San Bernardino County Board
3 of Supervisors to Dan Little Aug. 1, 2024).

4 **B. Over a Century of Use and Reliance on Water from Strawberry Canyon**

5 Arrowhead Springs abuts the San Bernardino National Forest (SBNF), and for
6 well over a century, has used and relied upon water from SBNF's Strawberry
7 Canyon. ECF No. 2-6 at 2. Since 1930, Plaintiff BlueTriton Brands, Inc.
8 (BlueTriton) and its predecessors in interest have accessed and operated water
9 diversion and conveyance structures on SBNF lands through a series of special use
10 permits (SUP) the USFS issued. *See* Garton Decl. at ¶ 4. Since 1931, Arrowhead
11 Springs has received a portion of the water delivered through the water delivery
12 system operated by BlueTriton and its predecessors (Subject Water). The Nation
13 relies on the Subject Water to operate Arrowhead Springs. *See id.* at ¶ 6.

14 Arrowhead Springs requires water for a variety of year-round uses, including
15 domestic and irrigation purposes, but also fire protection purposes in an area that is
16 at elevated risk for wildfire. *See* Garton Decl. at ¶ 6, 9, 10. Accordingly, a safe and
17 reliable water supply is crucial to meet these demands, which benefit not only the
18 Nation but also other fire-fighting agencies¹ that depend on the water to protect
19 Arrowhead Springs as well as the community at large. *See id.* at ¶ 8; *see also*
20 Ex. 12. Defendants knew about the Nation's reliance upon the water delivered to
21 Arrowhead Springs by BlueTriton before taking action to terminate this water
22 supply, because the Nation so informed them. Declaration of Daniel Little in
23 Support of Motion to Intervene and Motion for Preliminary Injunction (Little Decl.)

24

25 ¹ Local elected officials have expressed grave concern over Arrowhead Springs no
26 longer having access to water sourced from Strawberry Canyon, as those supplies
27 are vital to fire-fighting efforts in the region. *See, e.g.*, Joe Nelson, *Potential water*
28 *restrictions at Arrowhead Springs Hotel raise concerns over wildfire danger*, The
Sun, <https://www.sbsun.com/2024/08/23/potential-water-restrictions-at-arrowhead-springs-hotel-raise-concerns-over-wildfire-danger> (last visited Jan. 2, 2025).

1 at ¶¶ 10-13. Defendants nonetheless took this adverse action without notice to, or
2 consultation with, the Nation.

3 **C. The Nation's Water Rights**

4 The Nation has protectable property rights that are separate and distinct from
5 those of BlueTriton. The Nation and its predecessors have diverted and used water
6 from sources in the vicinity of Arrowhead Springs for well over a century and
7 accordingly possesses broad water rights in Strawberry Canyon, including riparian,
8 groundwater, and pre-1914 appropriative rights that pre-date the SBNF. *See ECF*
9 No. 15-6 at 87; *see also ECF No. 2-6 at 2*. In addition to these uses, Arrowhead
10 Springs has relied upon water delivered by BlueTriton and its predecessors since
11 1931. *See ECF No. 2-5 at 7*. The California State Water Resources Control Board
12 (SWRCB) order related to BlueTriton specifically states the [Nation] has “rights that
13 authorize diversions through [BlueTriton’s] facilities for beneficial use on
14 [Arrowhead Springs].” ECF No. 15-6 at 87.

15 **D. Defendants' Action to Terminate Water Deliveries to Arrowhead Springs**

16 Despite this historic operation and reliance, Defendants took action in July
17 2024 to terminate the Nation's water supply at Arrowhead Springs. The Notice of
18 Denial dated July 26, 2024, purports to terminate BlueTriton's authorization to
19 operate its infrastructure within the SBNF, and thereby effectively terminates all
20 water deliveries to the Nation. *See ECF No. 1-1 at 1*. Defendants provided no
21 notice of the agency decision to the Nation, nor did Defendants engage in any
22 government-to-government consultation with the Nation whatsoever before issuing
23 the Notice of Denial. *See* Little Decl. at ¶¶ 7, 8. Rather, the Notice of Denial
24 required that all water supply be terminated within *seven days* of the Notice. *See*
25 ECF No. 1-1 at 3 (emphasis added). Defendants took these steps to curtail water
26 deliveries to the Nation even though Defendants knew about the Nation's needs and
27 uses for the Subject Water, including for the Nation's and local agencies'

1 firefighting purposes. Defendants also knew the Nation lacks an alternative water
2 resource for Arrowhead Springs. Little Decl. at ¶¶ 10-13.

3 In response to the Nation's protest, Defendants modified their Notice of
4 Denial to temporarily authorize continued delivery of the Subject Water to
5 Arrowhead Springs until January 15, 2025. *See ECF No. 27-1 at 1*. At the Nation's
6 request, Defendants have attended meetings to discuss a solution to protect the
7 Nation's (and surrounding community's) interests. Defendants informed the Nation
8 they had no solution that could be implemented before January 15, 2025, and they
9 do not plan to further modify the Notice of Denial. *See* Little Decl. at ¶ 23.
10 Accordingly, BlueTriton will be required to turn off its entire water system and stop
11 delivering water to the Nation on January 15, 2025.

12 Defendants' refusal to permit continued water delivery to the Nation is
13 perplexing given the known importance of the water to the Nation, Arrowhead
14 Springs, and the surrounding community, all of which depend on the water for fire
15 protection. Garton Decl. at ¶¶ 9-11. It is also confounding given Defendants' trust
16 responsibility to the Nation, compared to a state agency's own acknowledgment and
17 protection of the Nation's water supply. Indeed, the SWRCB issued an order in
18 2023 that purported to terminate BlueTriton's water rights and prohibit certain
19 appropriations from continuing in the SBNF. *ECF No. 15-6*. However, the
20 SWRCB's order specifically carves out a water supply for the Nation and allows
21 continued delivery of the Subject Water to Arrowhead Springs. *Id.* at 87.²

22 Since before they issued the directive to curtail all water deliveries,
23 Defendants knew the Nation relied on the Subject Water to operate Arrowhead
24 Springs, which warrants federal consideration and protection given its historical and
25 cultural significance. They knew the Nation uses the Subject Water for not only a
26

27 ² The SWRCB order is currently stayed. *See* Law and Motion Minute Order,
28 *BlueTriton Brands, Inc. v. Eileen Sobeck/ WM*, No. 23CECG04292 (Fres. Dist. Ct. Jan. 24, 2024).

1 variety of on-site uses, but also for SBNF, state, local, and the Nation’s firefighting
2 purposes. *See* Ex. 12. And they knew the Nation lacks an alternative water source
3 available to meet the needs of Arrowhead Springs if the Subject Water is terminated.
4 *See* Garton Decl. at ¶ 12; *see also* Little Decl. at ¶¶ 21, 22. And yet, not only did
5 Defendants fail to consult the Nation before deciding to deprive the Nation of the
6 water it needs for Arrowhead Springs; they have failed to meaningfully consult
7 thereafter—both with respect to the impacts of the Notice of Denial to the Nation
8 and the impacts of BlueTriton’s decommissioning plan. Little Decl. at ¶¶ 16-20.

9 Defendants' decision to terminate the Nation's water supply, and direction to
10 BlueTriton to decommission the infrastructure that delivers that water supply,
11 violates numerous federal laws, regulations, and policies, as well as the trust
12 obligation that Defendants owe the Nation. Defendants have provided no
13 justification as to why the Nation's water supply should be immediately cut off.³
14 See ECF No. 1-1 at 1-3. They must be compelled to adequately address and
15 mitigate adverse impacts of their action on the Nation, and therefore, should be
16 preliminarily enjoined from prohibiting deliveries of the Subject Water pending the
17 outcome of this lawsuit.

III. STANDARD OF REVIEW

19 Federal courts are empowered to grant injunctive relief. FRCP 65; *see also*
20 L.R. 65-1. A plaintiff seeking a preliminary injunction must establish that (1) it is
21 likely to succeed on the merits, (2) it is likely to suffer irreparable harm in the
22 absence of preliminary relief, (3) the balance of equities tip in its favor, and (4) an
23 injunction is in the public interest. *All. for the Wild Rockies v. Cottrell*, 632 F.3d
24 1127, 1131 (9th Cir. 2011) (citation omitted). “When the government is a party, the
25 last two factors (equities and public interest) merge.” *E. Bay Sanctuary Covenant v.*
26 *Biden*, 993 F.3d 640, 668 (9th Cir. 2021). The factors for preliminary injunctive

²⁸ ³ The Notice of Denial does not include or address tribal water deliveries.

1 relief are evaluated on a “sliding scale,” meaning that “a stronger showing of one
2 element may offset a weaker showing of another.” *All. for the Wild Rockies*,
3 632 F.3d at 1131-32.

4 A preliminary injunction is not an adjudication on the merits, but rather a
5 device for preserving the status quo and preventing irreparable loss of rights before
6 judgment. *Textile Unlimited, Inc. v. A. BMH and Co., Inc.*, 240 F.3d 781, 786 (9th
7 Cir. 2001). Relevant to the Nation’s National Historic Preservation Act (NHPA)
8 claim, courts apply a “lenient standard for granting a preliminary injunction” to
9 challenges brought under the NHPA, particularly when the movant seeks to simply
10 maintain the status quo. *Apache Survival Coal. v. United States*, 21 F.3d 895, 912
11 (9th Cir. 1994).

12 **IV. ARGUMENT**

13 **A. The Nation Is Likely to Succeed on the Merits**

14 As explained below, Defendants’ issuance of the Notice of Denial violates the
15 NHPA, the National Forest Management Act (NFMA), the Administrative Procedure
16 Act (APA), numerous executive orders, and Defendants’ own regulations and
17 internal procedures. As a result, Defendants also violated their federal trust
18 responsibility to the Nation.

19 **1. This Court Should Hold Unlawful and Set Aside Defendants’
20 Issuance of the Notice of Denial**

21 The APA provides for judicial review of agency action. Courts must set aside
22 an agency action that is “arbitrary, capricious, an abuse of discretion, or otherwise
23 not in accordance with law,” “contrary to constitutional right, power, privilege, or
24 immunity,” “in excess of statutory jurisdiction, authority, or limitations, or short of
25 statutory right,” or “without observance of procedure required by law.” 5 U.S.C.
26 § 706(2). “In reviewing agency decision under the APA, we ask whether the
27 decision was based on a consideration of all the relevant factors and whether there
28 has been a clear error of judgment.” *Baccarat Fremont Developers, LLC v. United*

1 *States Army Corps of Eng’rs*, 425 F.3d 1150, 1153 (9th Cir. 2005) (citation
2 omitted). Decisions regarding the NHPA are reviewed under the APA’s standards.
3 *Morongo Band of Mission Indians v. FAA*, 161 F.3d 569, 573 (9th Cir. 1998).
4 Furthermore, when an agency changes positions, “it must ‘be cognizant that
5 longstanding policies may have engendered serious reliance interests that must be
6 taken into account.’” *Dep’t of Homeland Sec. v. Regents of the Univ. of Cal.*,
7 591 U.S. 1, 30 (2020) (citation omitted).

8 Defendants’ action in issuing the Notice of Denial violates the APA. As
9 discussed below, Defendants failed to engage in meaningful consultation with the
10 Nation as the NHPA required, failed to abide by the SBNF’s forest management
11 plan as the NFMA required, and failed to comply with numerous other federal laws,
12 including executive orders, regulations, and internal agency policies and procedures
13 that are described in detail below. Accordingly, the Nation is likely to prevail on the
14 merits of its claim.

15 **a. Defendants Violated the NHPA**

16 The NHPA has been characterized as a “stop, look and listen” provision that
17 requires agencies to fully consider the effects of their actions on historic and cultural
18 resources. *See, e.g., Te-Moak Tribe of Western Shoshone of Nevada v. U.S. Dep’t of*
19 *Interior*, 608 F.3d 592, 606 (9th Cir. 2010).

20 Under NHPA, a federal agency must make a reasonable and good faith
21 effort to identify historic properties; determine whether identified
22 properties are eligible for listing on the National Register based on
23 criteria in 36 C.F.R. § 60.4; assess the effects of the undertaking on any
24 eligible historic properties found; determine whether the effect will be
25 adverse; and avoid or mitigate any adverse effects.

26 *Kammeyer v. Oneida Total Integrated Enters.*, 2015 U.S. Dist. LEXIS 112910, 21
27 (*C.D. Cal. 2015*) (quoting *Montana Wilderness Ass’n v. Connell*, 725 F.3d 988,
28 1005 (9th Cir. 2013)). The NHPA specifically requires agencies to consult with
tribes (and other property owners) regarding properties that are eligible for listing in
the National Register of Historic Places, including sites that are culturally significant

1 to tribes. 54 U.S.C. § 302706; 36 C.F.R. § 800.2(c)(2). Agencies “must complete
2 the section 106 process . . . prior to the issuance of any license.” 36 C.F.R. § 800.1
3 (emphasis added).

4 **i. Defendants Never Considered the Impact to Historical
5 and Cultural Properties**

6 Agencies must comply with the NHPA for any “undertaking” that may impact
7 a culturally or historically significant site. Under the NHPA, an undertaking is
8 broadly defined as any project, activity, or program with federal agency
9 involvement, such as those carried out by federal agencies, assisted by federal
10 agencies, or that require a federal permit, license, or approval. 54 U.S.C. § 300320;
11 *see also Tyler v. Cuomo*, 236 F.3d 1124, 1128 (9th Cir. 2000).

12 Terminating the Nation’s water supply at Arrowhead Springs and issuing the
13 Notice of Denial constitutes an “undertaking” under the NHPA. The Notice of
14 Denial cuts off a physical water supply to a historically and culturally significant
15 property that has flowed continuously for over a century and to which the Nation
16 possesses broad and undisputed water rights. *See ECF No. 2-6 at 2, see also ECF*
17 No. 15-6. The Notice of Denial also grants an implied license to BlueTriton to
18 access the SBNF to sever pipes and boreholes and bypass all flow to the surface
19 from each point of diversion. *See ECF No. 1-1 at 3*. Furthermore, the Notice of
20 Denial requires BlueTriton’s submittal and, upon Defendants’ approval,
21 implementation of an intensive decommissioning plan. *Id.* Defendants’ approval of
22 BlueTriton’s decommissioning plan could be imminent, and BlueTriton’s plan as
23 currently proposed schedules decommissioning to begin on January 16, 2025.
24 Because the Notice of Denial constitutes an “undertaking,” Defendants cannot
25 require BlueTriton to cease water delivery to the Nation absent Defendants’ NHPA
26 compliance.

27 Agencies must meaningfully consider the potential effects of an undertaking
28 that may impact a culturally or historically significant site. NHPA compliance

1 involves a multi-step process to evaluate potential effects to listed or potentially
2 eligible sites. *See, e.g., Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d
3 800, 805 (9th Cir. 1999). A threshold step is determining the area of potential
4 effects (APE) of the agency activity. 36 C.F.R. § 800.4(a)(1). The APE is defined
5 to include the area “within which an undertaking may directly or indirectly cause
6 alterations in the character or use of historic properties.” *Id.* § 800.16(d). The
7 agency must evaluate the historic significance of such sites and determine whether
8 they are potentially eligible for listing under the National Register. *Id.* § 800.4(c).
9 Next, the agency must evaluate the potential effects that its activity may have on
10 those properties, *id.* § 800.5, and, finally, the agency must resolve any adverse
11 effects through the development of mitigation measures. *Id.* § 800.6. At every step,
12 the agency must consult with Indian tribes that attach religious and cultural
13 significance to affected sites, even if the sites are outside tribal lands. *Id.*
14 §§ 800.3(f), 800.4(a), 800.5(c)(2), 800.6, 800.2(c)(ii)(D).

15 Defendants did not consider the impacts of their action to terminate the
16 Nation’s water supply on historically and culturally significant properties.
17 Arrowhead Springs and the surrounding area constitute culturally significant sacred
18 sites, as defined in Executive Order 13007. These lands feature prominently in the
19 Nation’s oral history, were once the site of an ancient village known as Apuiva’t
20 occupied by the Nation’s ancestors, and the SBNF parcels implicated in the Notice
21 of Denial likely contain historic Serrano artifacts and sacred sites, which also exist
22 at Arrowhead Springs. *See* McCleary Decl. at ¶ 10.

23 The Notice of Denial incorrectly asserts that “[t]he hotel and conference
24 facility on the property is not operating.” *See* ECF No. 2-9 at 2. The USFS
25 included this inaccurate assertion in its Notice of Denial even though the Nation’s
26 representatives previously met with Defendants to ensure they had a full
27 understanding of the Nation’s water use at Arrowhead Springs. Not only did
28 Defendants refuse to engage with the Nation on a government-to-government basis,

1 they proceeded to issue a Notice of Denial that contained inaccurate statements
2 about the Nation's water needs, and did so in complete disregard for the significant
3 impacts that terminating the Nation's water supply poses for the Nation. *See* Little
4 Decl. at ¶¶ 10-13. Defendants' decision to cut off an existing, near century-old
5 water supply for the Nation was hurried, incomplete, based on false assertions
6 Defendants refused to acknowledge or correct, and casually undertaken without any
7 regard to the required NHPA analysis.

8 **ii. Defendants Did Not Meaningfully Consult the Nation**

9 The NHPA imposes specific requirements with which agencies must comply
10 in their consultations. Federal agencies that provide permit authorizations remain
11 responsible for their government-to-government relationships with tribes. 36 C.F.R.
12 § 800.2(c)(4). “Consultation means the process of seeking, discussing, and
13 considering the views of other participants, and, where feasible, seeking agreement
14 with them.” *Id.* § 800.16(f). An agency must “ensure” that the consultation process
15 provides a tribe with “a reasonable opportunity to identify its concerns about historic
16 properties, advise on the identification and evaluation of historic properties,
17 including those of traditional religious and cultural importance . . . and participate in
18 the resolution of adverse effects.” *Id.* § 800.2(c)(ii)(A).

19 Defendants failed to engage in the government-to-government consultation
20 that the NHPA required. Arrowhead Springs constitutes an important historic and
21 cultural resource, as Defendants have conceded, and terminating the Nation's water
22 supply there is likely to adversely affect it. *See* Ex. 14, Record of Decision San
23 Bernardino National Forest Land Management Plan 2006 Revision.⁴ And yet,
24 Defendants failed to notify the Nation before or after issuing the Notice of Denial;
25 rather, the Nation only learned of Defendants' action from BlueTriton.

26
27
28 ⁴ Phase I, II, and III, and the 2006 Revision, are combined and referenced via the
four digit bates number in red in the bottom right corner of the combined document.

1 Defendants conducted no assessment whatsoever of how the federal actions
2 may impact Arrowhead Springs or the Nation. Defendants not only allege—
3 incorrectly—that the Nation does need the water, they also inaccurately contend the
4 Nation is wasting water. *See ECF No. 1-1 at 2.* While Defendants have met with
5 the Nation since issuing the Notice of Denial, it was only at the Nation’s insistence,
6 and such “consultation” has hardly been meaningful. Little Decl. at ¶ 16. Indeed,
7 Defendants intend to prohibit further deliveries of the Subject Water to the Nation
8 beginning on January 15, 2025, even though they offer no solutions, refusing to hold
9 the water stoppage in abeyance without basis, knowing the action will leave the
10 Nation without water despite its well-established water rights. Little Decl. at ¶ 18.

11 Furthermore, BlueTriton plans to begin decommissioning on January 16,
12 2025, which could significantly and adversely impact Arrowhead Springs beyond
13 eliminating its water supply. Arrowhead Springs is located immediately
14 downstream of BlueTriton’s infrastructure, and the decommissioning process could
15 involve a risk of landslides, flooding, and reducing the water quality in Strawberry
16 Creek. Declaration of Paul Hamai in Support of Motion to Intervene and Motion for
17 Preliminary Injunction (Hamai Decl.) at ¶ 13. The Nation asked Defendants for the
18 decommissioning plan, only to be told to submit a Freedom of Information Act
19 request or to get the plan from BlueTriton. Little Decl. at ¶ 20. Further, the Nation
20 repeatedly requested that the parties enter a co-stewardship agreement or other
21 resolution that would balance the variety of interests involved. Joint Secretarial
22 Order 3403 requires Defendants to undertake collaborative co-stewardship
23 agreements with federally recognized tribes to manage federal lands and waters.
24 *See Ex. 15, Joint Secretarial Order 3403 (2023).* But Defendants have refused the
25 Nation’s requests, inventing new reasons for acting unilaterally, and without
26 engaging the Nation, every step of the way. Little Decl. at ¶ 19.

27 Defendants failed to comply with the NHPA by identifying historic and
28 cultural resources that could be impacted by the Notice of Denial and working to

1 mitigate any such impacts. Defendants also failed to engage in meaningful
2 consultation with the Nation as the NHPA required. Accordingly, Defendants'
3 termination of the Nation's water supply at Arrowhead Springs violates the NHPA.

4 **b. Defendants Violated the NFMA**

5 The NFMA charges Defendants with managing national forest land, including
6 planning for the protection and use of the land and its natural resources. *See*
7 16 U.S.C. § 1600 et seq. Under the NFMA, forest land management occurs on two
8 levels: (1) the forest level, and (2) the individual project level. *Native Ecosystems*
9 *Council v. Weldon*, 697 F.3d 1043, 1056 (9th Cir. 2012). “On the forest level,
10 [USFS] develops a Land and Resource Management Plan . . . which consists of
11 broad, long-term plans and objectives for the entire forest.” *Id.* The forest
12 management plan is then implemented at the project level. *Id.* Site-specific projects
13 and activities must be consistent with an approved forest plan. 16 U.S.C. § 1604(i);
14 36 C.F.R. § 219.10(e); Native Ecosystems Council v. United States Forest Serv.,
15 418 F.3d 953, 961 (9th Cir. 2005) (“It is well-settled that [USFS’s] failure to comply
16 with the provisions of a Forest Plan is a violation of NFMA.”). Site-specific actions
17 may include resource plans, permits, contracts, and other instruments for occupancy
18 or use of forest lands. *Inland Empire Pub. Lands Council v. United States Forest*
19 *Serv.*, 88 F.3d 754, 757 (9th Cir. 1996). Agency actions are considered consistent if
20 they conform to the applicable “components” of the forest plan, including the
21 standards, guidelines, and desired conditions that are set forth in the forest plan and
22 that collectively establish the details of forest management. *All. for the Wild*
23 *Rockies v. United States Forest Service*, 907 F.3d 1105, 1109-10 (9th Cir. 2018).
24 Defendants’ failure to comply with the provisions of a forest management plan
25 violates the NFMA. *Native Ecosystems Council*, 697 F.3d at 1056 (citation
26 omitted).

i. **Defendants Failed to Comply with the SBNF's Forest Management Plan**

3 The current land management plan for the San Bernardino National Forest
4 (SBNF management plan) became effective on October 31, 2005, and was thereafter
5 revised to better coordinate the SBNF's multiple uses. *See* Ex. 14 at 0008. The
6 SBNF management plan acknowledges the Nation's role in stewarding the SBNF
7 and historical reliance on SBNF resources. Accordingly, the SBNF management
8 plan directs how agency officials should engage with the Nation and requires
9 Defendants to make significant effort to identify and protect the Nation's traditional
10 and contemporary uses of SBNF resources. Recent revisions to the SBNF
11 management plan reaffirm Defendants' obligation to consider tribal priorities and
12 practices early on in the national forest planning, analyses, decision making, and
13 adaptive management processes. *Id.* at 0009-10.

14 Specifically, the SBNF management plan challenges forest managers to
15 “develop government-to-government relationships with the tribes in order to protect
16 resources, to resolve access issues, supply resources, and to continue the important
17 traditional or cultural uses of the national forests.” Ex. 14 at 0044. Defendants must
18 maintain the SBNF in a condition so tribes can exercise and retain traditional and
19 contemporary connections to the land. *Id.* at 0067. Accordingly, Defendants are
20 encouraged to continue historic access to the SBNF and consider contemporary uses
21 of SBNF resources. *Id.* at 0304. In doing so, Defendants should “use opportunities
22 during project planning and implementation to identify, enhance, and protect
23 traditionally or contemporarily used resources,” “establish effective partnerships to
24 address issues of mutual concern,” “establish effective relationships with . . .
25 federally recognized tribes,” “develop protocols to promote collaborative
26 partnerships for heritage resources management . . . ecosystem restoration,
27 comprehensive fire planning, and to recognize historic Native American access
28 rights to land areas and resources.” *Id.* at 0304.

1 The SBNF management plan also expresses a desire to identify and protect
2 heritage properties and to increase partnerships between Defendants and the Nation.
3 Ex. 14 at 0266. When consulting the Nation, the SBNF management plan directs
4 Defendants to “[i]mprove tribal consultation by making concerted effort to reach
5 tribes via initial and follow-up letters, phone calls, emails, and meetings to obtain
6 their concerns and opinions regarding proposed projects.” *Id.* at 0304. Finally, the
7 SBNF management plan acknowledges that “[w]ildland fire may be the biggest
8 challenge forest managers and the public face over the next couple of decades.” *Id.*
9 at 0044.

10 Defendants failed to take any of the required steps discussed above when
11 issuing the Notice of Denial. Little Decl. at ¶ 16. Defendants failed to notify the
12 Nation of the federal decision to terminate the Nation’s water supply. They likewise
13 failed to consider the Nation’s historic and contemporary uses of SBNF resources,
14 issues of historic access and reliance, or heritage properties and cultural resources
15 that could be impacted by infrastructure removal. Defendants’ actions over the past
16 six months have not indicated an attempt to improve relations with the Nation
17 through consultation, cooperation, and respectful communication, but rather,
18 Defendants’ actions have deteriorated those relations. Defendants have excluded
19 the Nation from the decision-making process regarding Strawberry Canyon water
20 diversion and use, propounded inaccurate assumptions regarding the Nation’s
21 operation of Arrowhead Springs, and refused the Nation’s request to enter a co-
22 stewardship or other cooperative agreement. Additionally, Defendants seek to
23 terminate a water supply used to fight wildfires throughout the region, including
24 within the SBNF, even though the SBNF management plan places special emphasis
25 on preparation and defense related to wildfires. Garton Decl. at ¶¶ 8, 9; *see also*
26 Ex. 14 at 0052-63.

27 Defendants’ issuance of the Notice of Denial violates the SBNF management
28 plan and its required procedures. Accordingly, Defendants violated the NFMA.

c. Defendants Failed to Comply with Their Own Policies and Procedures

3 Agency actions that fail to comply with executive orders, agency regulations,
4 and internal policies and procedures should be set aside. “The legal proposition that
5 agencies may be required to abide by certain internal policies is well-established.”
6 *Alcaraz v. INS*, 384 F.3d 1150, 1162 (9th Cir. 2004). “Where the rights of
7 individuals are affected, it is incumbent upon agencies to follow their own
8 procedures.” *Morton v. Ruiz*, 415 U.S. 199, 235 (9th Cir. 2004) (holding APA
9 requires agencies to follow internal procedures even when the procedures are “more
10 rigorous than otherwise would be required”). Federal courts routinely hold that
11 when an agency fails to comply with its own regulations, directives, and policies, it
12 has acted arbitrarily and capriciously. *See, e.g., Church of Scientology of Cal. v.*
13 *United States*, 920 F.2d 1481, 1487 (9th Cir. 1990) (“an administrative agency is
14 required to adhere to its own internal operating procedures”).

15 The following executive orders, agency regulations, and USFS policies and
16 procedures apply to Defendants:

- Joint Secretarial Order 3403 (2023) establishes that the United States Department of Agriculture (USDA) and Department of the Interior will manage “Federal lands and waters in a manner that seeks to protect the treaty, religious, subsistence, and cultural interests of federally recognized Indian Tribes . . . is consistent with the nation-to-nation relationship between the United States and federally recognized Indian Tribes; and, that such management fulfills the United States’ trust obligation.” Ex. 15, Joint Secretarial Order 3403 (2023).
- Presidential Memorandum on Uniform Standards for Tribal Consultation (2022) orders that federal agency consultation “requires that information obtained from Tribes be given meaningful consideration, and agencies should strive for consensus with Tribes or a mutually desired outcome.” Ex. 16,

1 Presidential Memorandum on Uniform Standards for Tribal Consultation
2 (2022).

- 3 • Executive Order 13647 (2013) recognizes “a government-to-government
4 relationship, as well as a unique legal and political relationship, with federally
5 recognized tribes” and in seeking to “better [carry] out its trust
6 responsibilities,” declares it the policy of the United States “to promote the
7 development of prosperous and resilient tribal communities” by “protecting
8 tribal lands, environments, and natural resources, and promoting respect for
9 tribal cultures.” Ex. 17, Executive Order 13647 (2013).
- 10 • Executive Order 13175 (2000) directs federal agencies to establish regular
11 and meaningful consultation and collaboration with tribal officials regarding
12 policies that have tribal implications and to operate within a government-to-
13 government relationship. Ex. 18, Executive Order 13175 (2000).
- 14 • Executive Order 13007 (1996) directs federal land managing agencies to
15 avoid adversely affecting the physical integrity of Indian sacred sites. Ex. 19,
16 Executive Order 13007 (1996).
- 17 • USDA Departmental Regulation 1350-002 directs the USDA and its agencies
18 to provide federally recognized Indian tribes the opportunity for government-
19 to-government consultation and coordination in policy development and
20 program activities which have direct and substantial effects on the tribes.
21 Ex. 20, USDA Departmental Regulation 1350-002.
- 22 • Forest Service Manual section 1563.1 provides that “[b]ecause Tribes . . . are
23 affected by Forest Service land and resource management policies, as well as
24 research, development, and other programs and actions, the [USFS] must
25 consult with them on matters that could affect their rights and interests.”
26 Ex. 21, Forest Service Manual section 1563.1. USFS consultation policies
27 specifically provide that “if an action or activity is confined to National Forest
28 System lands,” the USFS should “evaluate which Tribes . . . have connections

1 to, or benefit from, those lands” or “have cultural or historic connections to
2 those lands”; and to “err on the side of more rather than less consultation.”
3 *Id.*

4 Defendants’ actions completely fail to recognize the unique relationship that
5 exists between the United States and tribes. Defendants have not considered the
6 impact that the Notice of Denial is having as the Nation prepares for its
7 implementation and will continue to have on the Nation. The Notice of Denial does
8 not even consider the Nation’s cultural and natural resources, let alone protect them.
9 Further, it actually terminates an existing and historic water supply upon which the
10 Nation relies to operate Arrowhead Springs. Numerous executive orders,
11 regulations, and policies require Defendants to act differently than they have.
12 Defendants’ blatant disregard for the law and their obligations when issuing the
13 Notice of Denial constitutes an egregious violation of their legal duties to the
14 Nation.

15 **2. Defendants’ Issuance of the Notice of Denial Violated Their Trust
16 Responsibility to the Nation**

17 The U.S. Supreme Court has continuously recognized the existence of a trust
18 relationship between the United States and Indian tribes. *See Seminole Nation v.*
19 *United States*, 316 U.S. 286, 296 (1942); *Hoopa Valley Indian Tribe v. Ryan*,
20 415 F.3d 986 (9th Cir. 2005). This relationship requires the government’s conduct
21 in its dealings with tribes to be judged “by the most exacting fiduciary standards.”
22 *Seminole Nation*, 316 U.S. at 297. The federal government’s trust responsibility to
23 tribes, “in essence, consists of acting in the general interests of the tribes.”
24 *Skokomish Indian Tribe v. FERC*, 121 F.3d 1303, 1308 (9th Cir. 1997). As a result,
25 “agencies of the federal government owe a fiduciary responsibility to Indian tribes.”
26 *Morongo Band of Mission Indians*, 161 F.3d at 574.

27 The federal government’s trust responsibility extends to a tribe’s off-
28 reservation resources. Courts have held that “the various federal statutes aimed at

1 protecting Indian cultural resources, located both on Indian land and public land,
2 demonstrate the government’s comprehensive responsibility to protect those
3 resources and, thereby establishes a fiduciary relationship.” *Quechan Indian Tribe*
4 *v. United States*, 535 F.Supp.2d 1072, 1109 (S.D. Cal. 2008) (citing *Marlys Bear*
5 *Medicine v. United States*, 241 F.3d 1208, 1218 (9th Cir. 2009)). Indeed, this trust
6 responsibility also requires “compliance with general regulations and statutes not
7 specifically aimed at protecting Indian tribes.” *Gros Ventre Tribe v. United States*,
8 469 F.3d 801, 810 (9th Cir. 1998). Although compliance with statutory and
9 regulatory requirements can discharge an agency’s specific duty with respect to
10 tribes, that is not the case here, where Defendants have violated numerous federal
11 laws in issuing the Notice of Denial. As explained above, Defendants have violated
12 the NHPA, the NFMA, as well as executive orders, regulations, and policies that
13 mandate Defendants follow specific procedures when engaging with, or taking
14 action affecting, the Nation. These violations flaunt the significant federal trust
15 relationship.

16 Furthermore, Defendants attempt to prioritize their own water rights and uses
17 over those of the Nation, further violating Defendants’ trust obligation to the Nation.
18 The Nation possesses broad water rights in Strawberry Canyon that pre-date the
19 SBNF. *See ECF No. 15-6; see also ECF No. 2-6.* Defendants admitted in 1964 “the
20 government has never held any water rights” in Strawberry Canyon; whereas the
21 Subject Water has been delivered to Arrowhead Springs through BlueTriton’s
22 infrastructure since 1931. *See ECF No. 2-9.* Over the past six months, Defendants
23 have seemingly alleged that they possess water rights superior to those of both
24 BlueTriton and the Nation without providing any evidence of their needs or uses.

25 In California, federal law defers to state law to determine water rights.
26 *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 162
27 (1935). At times, “it may be necessary to stay federal action pending authoritative
28 determination of [a] difficult state question.” *Burford v. Sun Oil Co.*, 319 U.S. 315,

1 331 (1943) (citing *Railroad Commission v. Pullman Co.*, 312 U.S. 496 (1941)).
2 Here, Defendants not only refuse to defer to state water law, but they also exceed
3 their statutory authority by attempting to terminate the Nation’s water supply. The
4 SWRCB order on which Defendants partially base their justification for issuing the
5 Notice of Denial specifically acknowledges the Nation’s senior water rights and
6 carves out a water supply for the Nation. ECF No. 15-6 at 87. The Notice of Denial
7 does no such thing, but instead orders immediate termination of water deliveries to
8 the Nation and removal of the infrastructure that has delivered the Subject Water to
9 Arrowhead Springs for nearly a century. Given the Nation’s senior rights under
10 state law, Defendants have twice modified the Notice of Denial to permit limited
11 water deliveries to Arrowhead Springs. However, that temporary authorization
12 expires on January 15, 2025, and Defendants have never explained why Defendants
13 are refusing to extend such temporary authorization further. ECF No. 27-1 at 1.

14 Defendants’ violations of the NHPA, the NFMA, the APA, and other federal
15 laws violate the trust responsibility Defendants owe the Nation. Furthermore, their
16 interference in the operation of state water law to the detriment of the Nation,
17 without any basis whatsoever, renders their trust violations even more egregious.

18 Because Defendants acted arbitrarily and capriciously, contrary to their
19 constitutional right, beyond their statutory authority, and without observance of
20 procedures required by law, and because Defendants violated their trust obligation
21 to the Nation, this Court should set aside and invalidate the Notice of Denial to the
22 extent that it terminates and prohibits delivery of the Subject Water to the Nation.

23 **3. The Nation Will Suffer Irreparable Harm Unless the Court
24 Preliminarily Enjoins the Notice of Denial**

25 The Court must set aside Defendants’ action if it would irreparably harm the
26 moving party. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). Here,
27 terminating the Nation’s water supply for Arrowhead Springs before the Nation can
28 secure an alternative water supply would irreparably harm the Nation.

1 Arrowhead Springs has received the Subject Water for nearly a century, and
2 the Nation depends on it. Without sufficient water to maintain the Nation's facilities
3 at Arrowhead Springs, let alone to fight fires in the area, the Nation and surrounding
4 communities face significant risk of property damage and loss of life from wildfire.
5 Garton Decl. at ¶ 9.

6 Furthermore, if Defendants order BlueTriton to move forward with its
7 decommissioning plan, the Nation and Arrowhead Springs would be harmed.
8 Arrowhead Springs is located at the base of Strawberry Canyon, downstream of
9 BlueTriton's water delivery infrastructure proposed to be removed. The removal
10 plan contemplates intensive construction and remediation, all taking place in a
11 rugged and remote wilderness canyon. Such a project would likely negatively
12 impact both the quantity and quality of the water flowing across the Nation's
13 property and endanger the property itself. Hamai Decl. at ¶ 13. The removal plan
14 requires significant technical and legal review to protect the Nation's interests;
15 however, the Nation has not had sufficient time to review the plan. Indeed,
16 Defendants refused to even provide the Nation the decommissioning plan, and like
17 the Notice of Denial, the Nation had to obtain a copy from BlueTriton. Little Decl.
18 at ¶ 20.

19 Defendants seem to allege that forest resources require an immediate action to
20 prohibit diversions from Strawberry Canyon and that immediate infrastructure
21 removal is necessary, but they provide no facts in support. Further, the Nation has
22 engaged technical experts who believe the existing infrastructure could actually be
23 used to increase water flow in Strawberry Creek; whereas removal may permanently
24 alter its hydrology and damage the surrounding environment. Hamai Decl. at ¶ 13.
25 It is crystal clear that further analysis is essential to avoid irreparable injury to the
26 Nation, the SBNF, and its natural resources. *Id.*

27 The Notice of Denial terminates the Nation's water supply at Arrowhead
28 Springs and mandates BlueTriton engage in a complicated and intensive removal

1 process, which is scheduled to begin on January 16, 2025. Given the peril the
2 decommissioning plan poses for the Nation’s property and cultural interests, the
3 Nation is likely to suffer irreparable harm if Defendants are not preliminarily
4 enjoined from enforcing the Notice of Denial.

5 **4. The Balance of Equities and the Public Interest Favor Issuing a
6 Preliminary Injunction**

7 “When the government is a party, the last two factors (equities and public
8 interest) merge” in assessing whether to grant a preliminary injunction. *E. Bay
9 Sanctuary Covenant*, 993 F.3d at 668. Here, both factors support preliminary
10 injunctive relief.

11 By this motion, the Nation seeks to maintain the status quo for the continued
12 delivery of the Subject Water upon which Arrowhead Springs has relied for nearly a
13 century. Defendants, on the other hand, seek to disrupt that status quo immediately
14 without engaging in proper review or consulting the Nation regarding potential
15 adverse impacts. Defendants have not justified their reasoning for seeking to
16 immediately terminate the Nation’s water supply, particularly considering multiple
17 courts are currently engaging in relevant judicial reviews of Defendants’ actions and
18 underlying basis for those actions. *See ECF No. 50*. Defendants have also failed to
19 justify their shift in policy on which the Nation and Plaintiff (and their predecessors)
20 have relied for nearly a century.

21 The public interest strongly favors an injunction. The Nation not only relies
22 on the Subject Water to operate its own property and facilities, but also to maintain
23 fire suppression facilities in an area prone to fire risk. Garton Decl. at ¶¶ 5, 6, 8-10.
24 The SBNF management plan acknowledges wildfire risk as Defendants’ “biggest
25 challenge.” Ex. 14 at 0044. Regardless, Defendants seek to terminate the Nation’s
26 firefighting water supply, which will harm surrounding communities that are not
27 party to this case. Without an injunction, life and property will be placed in peril as
28

1 water that is used to fight fires on and around Arrowhead Springs is taken away.
2 Ex. 12 at 1.

3 Given the significant harm the Nation would suffer from Defendants' actions,
4 and the lack of justification for Defendants' Notice of Denial, the balance of equities
5 strongly favors injunctive relief. Furthermore, given the risk to property and life
6 imposed by Defendants' actions, the public interest strongly favors injunctive relief.

7 **V. THE NATION SHOULD NOT BE REQUIRED TO POST A BOND**

8 When a court issues a preliminary injunction, it may also require that the
9 movant post a bond "in an amount that the court considers proper to pay the costs
10 and damages sustained by any party found to have been wrongfully enjoined."
11 FRCP 65(c). "The court is afforded wide discretion in setting the amount of the
12 bond, and the bond amount may be zero if there is no evidence the [restrained] party
13 will suffer damages from the injunction." *Connecticut Gen. Life Ins. Co. v. New*
14 *Images of Beverly Hills*, 321 F.3d 878, 882 (9th Cir. 2003) (citation omitted).

15 The Court should decline to impose a bond here. The requested injunction
16 would maintain the status quo that has existed since 1931. Defendants would suffer
17 no harm from a preliminary injunction preventing their enforcement of the Notice of
18 Denial pending a final judgment in this matter. Accordingly, no bond is necessary.

19 **VI. CONCLUSION**

20 This Court should preliminarily enjoin Defendants from (1) enforcing the
21 Notice of Denial as related to the Nation, thereby terminating the Nation's water
22 supply at Arrowhead Springs, and (2) moving forward with BlueTriton's removal
23 plan. The Nation, which is only seeking to maintain the status quo for water
24 delivery that has been in place for nearly a century, is likely to succeed on the merits
25 because Defendants seek to violate the Nation's clearly established water rights, and
26 in doing so, have violated their trust obligation to the Nation, the NHPA, the
27 NFMA, and numerous other federal laws, regulations, and policies. Without
28 preliminary relief, the Nation is likely to suffer irreparable harm. The balance of

1 equities and public interest tip strongly in favor of the Nation. Accordingly, the
2 Nation respectfully requests the Court grant the preliminary injunctive relief sought
3 by the Nation against Defendants.

4 The undersigned, counsel of record certifies that the Memorandum of Points
5 and Authorities contains 6,900 words, which complies with the word limit of
6 L.R. 11-6.1.

7 Respectfully submitted,

8 SOMACH SIMMONS & DUNN, PC

9 Dated: January 3, 2025

10 By s/ Stuart L. Somach

11 Stuart L. Somach (SBN 90959)
12 Maximilian C. Bricker (SBN 350150)
13 Attorneys for [PROPOSED] Plaintiff-
14 Intervenor YUHAAVIATAM OF SAN
15 MANUEL NATION, a federally recognized
16 Indian tribe, also federally recognized as
17 SAN MANUEL BAND OF MISSION
18 INDIANS

1
TABLE OF EXHIBITS

2	1	April 18, 2024, Letter from BlueTriton Brands, Inc. to Nobles
3	2	May 24, 2024, Letter from Nobles to BlueTriton Brands, Inc.
4	3	June 4, 2024, Letter from BlueTriton Brands, Inc. to Nobles
5	4	July 30, 2024 Letter Request for Consultation
6	5	November 4 and November 15, 2024, Letter From Nation to United States Forest Service
7	6	1931 Contract Also mentioned in Paragraph 7 of Hamai Decl.
8	7	December 11, 2023 80/20 Letter Agreement
9	8	NCRE Map
10	9	SWRCB Order 2023-0042
11	10	Notice of Denial July 26, 2024
12	11	Decommissioning Plan October 2024
13	12	August 1, 2024 Letter regarding Loss of Water Supply at Arrowhead Springs Property
14	13	November 15, 2024 Letter from Nation to United States Forest Service
15	14	San Bernardino National Forest Land Management Plan 2006 Revision, Phase I, II, and III
16	15	Joint Secretarial Order 3403-2023
17	16	Presidential Memorandum on Uniform Standards for Tribal Consultation
18	17	Executive Order 13647
19	18	Executive Order 13175
20	19	Executive Order 13007
21	20	USDA Departmental Regulation 1350-002
22	21	Forest Service Manual section 1563.1